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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 63

No. ~~840~~ 3

DALE H. DREWS, ET AL., *Appellants,*

v.

STATE OF MARYLAND, *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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STATE OF MARYLAND,
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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss or affirm on the following grounds:

(a) This appeal is not within the jurisdiction of this Court because it has not been taken in conformity with statute.

(b) This appeal does not present any substantial Federal question as to warrant further argument.

STATEMENT OF FACTS

The four Appellants were convicted by the Circuit Court of Baltimore County, Maryland, sitting without a jury, of

violating Article 27, Section 123, of the Annotated Code of Maryland (1957 Ed.), "by acting in a disorderly manner to the disturbance of the public peace" in a "place of public resort or amusement". Two of the Appellants are white men, one is a white woman and the last a Negress.

The Appellants, accompanied by a Negro who was not tried, on Sunday, September 6, 1959, went to Gwynn Oak Park, a public amusement park in Baltimore County, owned and operated by a private corporation. The management of the park as a business policy did not admit Negroes and the Appellants were requested by a private park guard to leave the premises. The Appellants refused and, as a result, a crowd began to gather. The private police officer enlisted the assistance of Baltimore County policemen who were stationed on a public road nearby to eject the group from the park. Baltimore County policemen arrived and requested that the Appellants leave the park. Upon receiving instructions from the park management, the Baltimore County policemen advised the Appellants that they had a choice of withdrawing or being arrested. They refused to leave, at which time they interlocked their arms and two of them dropped on the ground in a prone position. As a result of this conduct, the crowd which had gathered became unruly and began hollering, spitting and kicking at the Appellants as well as the officers, creating a mob scene. The Appellants were thereupon taken by the County Police from the scene and transported to a nearby police station where a warrant was sworn out by the amusement park management.

Thereafter, the State filed a criminal information charging violation of Article 27, Section 123, of the Annotated Code of Maryland, *supra*, and the Appellants elected to be tried by the Court sitting without a jury. The trial court, by its opinion dated May 6, 1960 (Appendix B of the Juris-

dictional Statement), found that from the facts and circumstances there was clear and convincing proof that public disorder reasonably could be expected if Appellants were allowed to remain in the park, and that the continued refusal of the Appellants to leave at the request of the police constituted "acting in a disorderly manner to the disturbance of the public peace." From the opinion of the trial court, it does not appear that the Appellants raised any Constitutional issues in that court. In fact, the Motion for Directed Verdict made by counsel for the Appellants in the trial court only raised two grounds: (1) "... that there had been no proof to indicate that the nature of the area in which the alleged offenses occurred was a place of public resort or amusement" and (2) "... that there has been no indication of any action on the part of the Defendants which would be described as disorderly".

On appeal to the Court of Appeals of Maryland, the Appellants raised four questions, to wit:

1. What constitutes a place of public resort or amusement within the meaning of Article 27, Section 123 of the Annotated Code?

2. Was there evidence to establish the public character of Gwynn Oak Park, the scene of the actions with which Appellants were charged?

3. Did any acts of Appellants constitute acting in a disorderly manner to the disturbance of the public peace?

4. Did conviction of Appellants infringe upon the rights privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States?

The Court of Appeals of Maryland, notwithstanding the fact that the Appellants did not raise constitutional questions in the lower court, found by its opinion that the

amusement park had a legal right to maintain a business policy of excluding Negroes, a private policy in which the State neither legislated or assisted. The Court further found that the arrest of the Appellants was not because the State desired or intended to maintain the park as a segregated place of amusement, but, rather, because the Appellants were inciting a crowd by refusing to obey a valid directive to move from a place where they had no lawful right to be. The Court of Appeals of Maryland concluded that the action of the State in arresting and convicting the Appellants on warrants sworn out by the amusement park for disorderly conduct did not constitute "such action as may fairly be said to be that of the State's."

ARGUMENT

I.

THIS CASE IS NOT WITHIN THE APPELLATE JURISDICTION OF THIS COURT.

The Appellants did not claim at any stage of the proceedings that the provisions of Article 27, Section 123, Annotated Code of Maryland, *supra*, were void, but, rather, now contend that the application of the statute was discriminatory and, therefore, in violation of the Fourteenth Amendment. Since no claim is made that the statute involved was invalid, an appeal will not lie. See *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185; *Jett Bros. Distilling Co. v. Carrollton*, 252 U.S. 1; *Mergenthaler Linotype v. Davis*, 251 U.S. 256, 259.

II.

THIS APPEAL DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THIS CASE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The Appellants assert that the State of Maryland, as a result of the decision below, has made the act of refusing

to leave an amusement park owned by a private corporation, when the request to leave arises solely from the policy of the park to exclude Negroes, a criminal offense. Nothing can be further from correct. The position of the State of Maryland in this case is very clear. The State of Maryland neither required nor assisted by legislation or otherwise the decision of the amusement park, as a matter of business policy, to exclude Negroes. The State of Maryland has neither condemned nor condoned such business decision and policy. The arrest of the Appellants was not because the State desired or intended to maintain the park as a segregated place of amusement, but rather because the Appellants were inciting the crowd and, therefore, were acting in a disorderly manner. Both white and colored people in this instance acted in a disorderly manner, and the State without discrimination arrested and prosecuted all those who were so acting. As was stated by this Court in *Shelley v. Kraemer*, 334 U.S. 1, 13:

> "The action inhibited by the first Section of the Fourteenth Amendment is only such action as may be fairly said to be that of the State's. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*" (Emphasis supplied.)

The State of Maryland has not only the right but the duty to protect the public against disorders which may occur, regardless of the race of the participants. It was clearly recognized in the case of *Bernstein v. Real Estate Commission of Maryland*, 221 Md. 221, appeal dismissed 363 U.S. 419, that the general State laws apply to all with equal force, regardless of their race, and that violation of the general public laws cannot be shielded from State action on account of race. To follow the Appellants' contention,

if an argument arose between two private persons engendered by racial discrimination, and one of the persons caused physical harm or death to the other, the State would be powerless to prosecute the offender because the private argument erupted from a racial question. Thus, if one of the individuals was murdered, the State would be powerless to prosecute the murderer because it would, under the Appellants' theory, be fostering a policy of racial discrimination. With this contention, the State of Maryland most emphatically demurs. The Appellants are not entitled to an unexpressed exemption in the disorderly conduct law.

In the recent case of *Griffin v. Collins*, 187 F. Supp. 149, 153, Chief Judge Thomsen of the United States District Court for the District of Maryland, in denying a preliminary injunction and motion for summary judgment in a suit brought to end the segregation policy of the Glen Echo Amusement Park near Washington, stated:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. *Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights.*" (Emphasis supplied.)

To permit the contention of the Appellants herein to be established as the law of this nation would completely

obliterate the rights of owners of private property to keep unwanted persons from such property. It has been clearly established and recognized that places of public accommodation, resort and amusement can exclude patrons which they deem undesirable in the eyes of the management. See *Garifine v. Monmouth Park Jockey Club*, 148 A. 2d 1 (New Jersey); *Madden v. Queen's County Jockey Club*, 72 N.E. 2d 697 (New York); *Greenfeld v. Md. Jockey Club*, 190 Md. 96, 57 A. 2d 335; *Slack v. Atlantic White Tower Systems, Inc.*, 181 F. Supp. 124; *Williams v. Howard Johnson's Restaurant*, 268 Fed. 2d 845.

This Court, in the recent case of *Boynton v. Virginia*, 364 U.S. 354, clearly recognized this principle when it said that every time a bus stops at a wholly independent roadside restaurant, the Interstate Commerce Act does not require that restaurant service be supplied in harmony with the provisions of that Act. The issues presented in the case at bar were squarely presented for decision in the *Boynton* case, *supra*, but the Court chose to decide the case on other grounds.

The establishment involved in this case was not publicly owned or operated, nor was it operated by or franchised by the State, and the State had no law requiring segregation on these premises. Consequently, under the general principles of law enunciated by this Court, as well as the rulings of the lower Federal Courts cited herein, the police officers did have a legal right to direct the Appellants to leave the park after their refusal to obey the order of the private police officer. Since the Appellants disobeyed the officer's directive and in so doing created a public disturbance, the State of Maryland had every right to arrest and prosecute the Appellants for this disturbance.

CONCLUSION

In conclusion, the State of Maryland respectfully submits that the appeal from the Court of Appeals of Maryland be dismissed, or, in the alternative, the decision of the Court of Appeals be affirmed, the mandate to issue forthwith.

Respectfully submitted,

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